EXHIBIT A

01:12:40

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CIGNEX DATAMATICS, INC.,)
)
Plaintiff,)
) C.A. No. 17-320(MN)
v.)
)
LAM RESEARCH CORPORATION,)
)
Defendant.)

Thursday, December 13, 2018
2:00 p.m.
Courtroom 4A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

HALLORAN FARKAS + KITTILA, LLP
BY: THEODORE ALLAN KITTILA, ESQ.

Counsel for the Plaintiffs

CROSS & SIMON, LLC
BY: CHRISTOPHER PAGE SIMON, ESQ.
BY: DAVID GERARD HOLMES, ESQ.

Counsel for the Defendant

01:52:29 THE COURT: Good afternoon.

01:58:00 (All said good afternoon.)

01:58:05 MR. SIMON: Good afternoon, Your Honor. If I could introduce myself to the Court, I'm Chris Simon of Cross & Simon on behalf of the defendant/counterclaim plaintiffs, Lam Research Corporation. To my left is my colleague, David Holmes, of Cross & Simon. And we're here today as I understand it on two matters for the Court. Both of those were filed by Lam Research Corporation, so I will defer to Your Honor on how you would like to proceed today, if at all with the motions, which order.

01:58:34 THE COURT: Let's get some other introductions from the plaintiff and then we can chat.

01:58:38 MR. SIMON: Of course. Sorry. Thank you. Your Honor.

01:58:41 THE COURT: Okay.

01:58:42 MR. KITTILA: Good afternoon, Your Honor.

01:58:43 THE COURT: Good afternoon.

01:58:44 MR. KITTILA: Ted Kittila on behalf of plaintiff CIGNEX. I have with me Karen Light. She is with my office of Halloran Farkas + Kittila. She's here assisting me here today.

01:58:55 THE COURT: Good afternoon.

01:58:56 So Mr. Simon raised the issue of how we should proceed. They're both defendant motions, so do the

01:59:02 defendants have a preference? I don't have any.

01:59:07 MR. SIMON: Your Honor, again for the record,
01:59:09 Chris Simon. I don't have a preference at all. I would
01:59:13 like to proceed as the Court sees fit. And I guess maybe
01:59:16 the way to take them just for no other reason than the way
01:59:19 they were filed, they were filed motion for leave to offend
01:59:22 -- amend was filed first on July 16. Sorry for that slip
01:59:26 up.

01:59:27 THE COURT: Now offending, please.

01:59:31 MR. SIMON: That will be the first of many today
01:59:32 I'm sure, Your Honor. If we could, I'll just start with the
01:59:35 one motion to file first and we'll proceed that way.

01:59:39 So on July 16, Lam Research Corporation, our
01:59:43 client, filed its motion for leave to amend its counterclaim
01:59:46 to include a claim for precision. And the filing followed
01:59:50 the completion of depositions and written discovery. As
01:59:55 very brief background, Your Honor, CIGNEX filed the
01:59:57 complaint in this matter alleging that it delivered software
02:00:00 as per Lam's requirement. CIGNEX also alleged Lam never
02:00:06 objected that the software did not meet the quote, agreed
02:00:10 material criteria.

02:00:13 And CIGNEX also alleged that it performed all
02:00:16 its obligations under the parties' agreement. The agreement
02:00:20 is attached as Exhibit A to the complaint and states that
02:00:24 the contractor shall render such services as may be

necessary to complete in a professional manner the project described as follows: Software integration and POC for MyLam PK redesign project.

In written discovery, CIGNEX repeatedly gave in our opinion inconsistent and unclear answers to basic questions posed by Lam regarding its understanding of the basic terms of the parties' agreements and what obligated Lam to pay. Those responses are set forth in detail in our pleadings and as exhibits. We asked basic questions. What was the intent of the agreement? What is a deliverable? What obligates Lam to pay CIGNEX?

THE COURT: Can you just give me one second.

MR. SIMON: Yes.

THE COURT: Okay. Sorry about that.

MR. SIMON: And the premise for those questions I believe it's fair to say is black letter law in Delaware that a party asserting a breach of contract claim must articulate sufficiently definitive terms of an agreement. And that case I believe is cited in our motion, but if not, Sheetz versus Quality Assured, 2004 WL4941983. And another case cited in our agreement, in our motion is the Gallagher case from 2010, the enforceable contract must contain all material terms of agreement and material provisions that are definite will be enforced.

So when we got these what I will call vague and

indefinite answers to discovery and then in depositions when we learned that CIGNEX, CIGNEX witnesses testified that they didn't understand what they were tasked to do, and I say that in summary fashion, but that was the essence of their testimony, we filed after immediately filing the depositions, we wrote counsel for the -- for CIGNEX and asked if they would consent to our request for leave to amend the complaint which they refused, so we filed a motion asking for leave to amend the counterclaim.

And the basis for that is if, in fact, there is no definite agreement, and I take CIGNEX's claim on its face and we look at that for purposes of this motion, they allege there is an agreement and they allege that they're entitled to be paid. And they allege they performed completely under the agreement. If, in fact, in discovery they take the position that they don't know what the agreement is, they don't know what they were supposed to do and there was misunderstanding between the parties as to what was to be completed, to me that seems like grounds for reaching a conclusion by the court or a jury that there was never a meeting of the minds between the parties as to what was to be done and, therefore, a court could order that a contract be rescinded. So that was the basis for the motion to leave to amend the counterclaim. And we filed it, as you know.

In response, CIGNEX has taken two positions.

I'll certainly let Mr. Kittila tell me if I'm wrong there. First they say that we blew the deadline for leave to amend, which we did file it after the court ordered deadline.

THE COURT: Two months, or three months, three months after the Court ordered deadline.

MR. SIMON: That's correct. There is no dispute of fact on that. And second, they will be prejudiced because we're essentially asserting a new claim which they will be barred from taking discovery on.

THE COURT: But you agree that the standard here is good cause; right?

MR. SIMON: The cases do say if there is a deadline in place that you need to demonstrate good cause. And so our argument on good cause is well, we rely on your complaint to tell us what your theories of the case are, and when we filed an answer to the complaint we allege we think we had an agreement, too, and we think you breached it. And you say -- and we did say in our counterclaim, we think you didn't really understand what you were doing, and they say no, no. Their answer to our counterclaim is, we understood fully what we were supposed to do when we completed the contract. That's what we're on notice. And that's how we are going to defend the case and respond to the complaint.

So when we get into discovery, the witnesses take a totally different path, I think under the rules and

under the case law for Rule 15, we have a right to seek leave to amend and I think --

THE COURT: But Rule 16 is what applies, right, because you blew the deadline.

MR. SIMON: I would take umbrage to that because I believe the Third Circuit case law on amending a complaint, the overriding principle on amendment is whether there is prejudice to the nonmoving party.

THE COURT: Can you cite to me any cases where the deadline set in the scheduling order has been passed and the decision is made under Rule 15 rather than Rule 16.

MR. SIMON: Not as I stand here today, Your Honor. I'm sorry, I can't be of help there.

But I would say this to the Court is at the time we filed -- we entered into the scheduling order, we had no idea that they were going to bring these theories and claims before us and the court on their case. None. And had we known that, we would have never consented to the deadline for leave to amend occurring before the close of fact discovery.

And I think -- you know, look, this is a scheduling order. I understand that the Court wants us to abide by the scheduling order and we strive to do that in all cases, but if a party comes into a litigation and asserts new claims in discovery, I think the court has great

discretion to say I will modify my scheduling order if we can demonstrate some reason why we didn't abide by the deadline. And I think here it's because we weren't on notice of this theory at all.

THE COURT: And your position is the first time you were on notice is at the deposition of the 30(b)(6) witness on June 6th; is that right?

MR. SIMON: That's the first time we had evidence of their position. We had some intimation. We believe internally they didn't know what they were doing sufficient to finish the project, otherwise none of us would be here. But we didn't realize that they had -- that they -- we didn't know that they didn't agree to the contract was what we believed it said, that they had to complete the project. And we didn't know that their position in the case would be we actually didn't complete the project because we didn't know what we were doing.

THE COURT: I'm not sure I understand. What is your position on when you knew that there was what you consider to be a change in position?

MR. SIMON: Our position is in the depositions for the -- well, in the responses to interrogatories, they were not clear as to what their position was and they told us in their interrogatory responses specifically it's too complicated to tell you here, we'll figure this out in

depositions. That's in their response.

THE COURT: And you knew the depositions were going to occur after the deadline for amending. If fact, you didn't even notice the deposition of the company, CIGNEX, after -- I think you noticed it in March for May 1st, so you noticed it to occur after the deadline.

MR. SIMON: That's correct.

THE COURT: But you didn't ask to have that deadline moved.

MR. SIMON: No. That's true. I will take the heat for any blown deadlines as far as the deadline being blown, but I don't believe it was blown because we were asleep at the switch, we just -- we didn't have a viable claim for recision at that point. We didn't believe -- we still -- it's a remedy, the court or the jury could fashion it if, in fact, the parties come into court and the testimony is we don't believe there was a meeting of the minds here.

We're not asking the Court to decide today the merits of the case, we're just asking the Court to say can we have this remedy if, in fact, this is the evidence. And this is what we knew when we responded to complaint. Look, if Your Honor wants to bar them from taking a position that they didn't understand, that they didn't believe there was an agreement, there was a meeting of the minds, maybe we

02:09:07 don't need a revision. But if they can come into the court
02:09:11 and put evidence in the record that says we never had a
02:09:13 meeting of the minds, then I think justice and all the case
02:09:17 law deals with amending the claims even after a trial would
02:09:21 permit us leave to amend.
02:09:23 I can tell you, I have been doing this for quite
02:09:25 a while, I have never seen an early -- I have never seen an
02:09:32 early deadline contemplated, deadline to amend, contemplated
02:09:36 to cut somebody off from making a good faith claim when they
02:09:43 discover facts late in the ball game.
02:09:46 I can tell you this, since that time when I
02:09:49 received scheduling orders from courts that propose a
02:09:52 deadline for leave to amend prior to the end of fact
02:09:56 discovery, I have asked that it be moved because of this
02:09:59 experience. But that doesn't mean that at the time I knew
02:10:03 that we had a claim for recision that I didn't feel like
02:10:07 bringing it or didn't think of bringing it.
02:10:09 We allege that we had an agreement. They allege
02:10:11 we had an agreement. They allege they performed under the
02:10:13 agreement. We allege that they didn't perform under the
02:10:16 agreement. And low and behold in these depositions they
02:10:20 tell us we never knew what to do. You never signed an SRS.
02:10:25 We didn't know what the project scope was. We didn't
02:10:28 realize that these were features that you wanted.
02:10:30 So I think at that point we then had evidence

of, evidence of this lack of meeting of the minds. And at that point, in fact they write us a letter and say as the depositions revealed or made clear, you know, the parties, our client didn't know what it was supposed to do. And that occurred after the deposition.

So I wrote Mr. Beehler, I said we have this claim, we have a right to bring it, would you consent to it. And he said no. So I filed a motion.

So, Your Honor, look, I don't have a case where distinguishing between Rule 16 and Rule 15, but I think there are plenty of cases where the Third Circuit has said that the primary bar to -- barring amendment would -- barring amendment would be appropriate if there is prejudice. Prejudice should be the focus of the court. I'm not looking to take new discovery. I don't think they need to take new discovery. This is their evidence. They put it in the record. They can live and die by it.

THE COURT: If they told me they need new discovery, what am I supposed to do with that?

MR. SIMON: If they can show cause for taking a deposition of an individual based on the fact that we have a claim now for recision, I don't think I would oppose that, on a limited topic. I mean, the witness --

THE COURT: Summary judgment motions have already been filed; right?

02:12:00 MR. SIMON: We did file summary judgment motion on breach of contract claims. It in some ways tracks these same facts which are their facts, not ours. We have made allegations, and we have been consistent with those allegations to this day through the summary judgment. So, look, again, we deal -- when you're a defendant in the case, you deal with the theories that are brought by the plaintiff, we deal with those theories, we responded to these theories. Those are not theories they're trying to bring today, not by a long shot. And I think there is a reason why, it's because when we got into discovery, we got the evidence, the documents, they had to admit that they didn't finish the project. We never got the chance to test it. It never went live. There were defects the entire time the project existed. And they don't have a contractual claim. They only brought one claim, they brought a claim for breach of contract.

So they have tried to shift gears in discovery and say that they didn't understand what was going on. Well, if you don't have a meeting of the minds, then there is no prejudice to them. We're willing to give them the code back. We said you can have the development code, we'll give it back to you. We made that commitment. We will make that commitment if we file the amended counterclaim. And ultimately if we have a trial in this case, if Your Honor

rules on dispositive issue then we can see the facts, the remedy fits the facts.

THE COURT: Okay.

MR. SIMON: Your Honor, I don't have much more to add than what's in our motions, so I'm happy to yield the podium. If Your Honor had any questions, I would be happy to answer them or try to answer them.

THE COURT: The one question I had, and this is something that was in your brief, in your opening brief that CIGNEX picked up on which was one of the things that you're relying on in terms of them changing their position were statements during mediation. And I don't need to get into discussions at mediation, but you brought it up as something that suggested that you knew they were changing their position. And since that was two -- you're relying on it to say they were changing their position. Since that was two months before the deadline, what am I supposed to do with that?

MR. SIMON: Well, look, I got to be careful here. We never talked to them directly in mediation. The story -- there was -- I got to be careful here. We talked about that after I filed the brief with prior counsel.

There was blame placed on our client for why it wasn't finished. That was essentially what they were saying for lack --

02:15:07 THE COURT: That seems clear not just from
02:15:12 mediation, that seems clear from the other papers I read in
02:15:15 this case.
02:15:16 MR. SIMON: Right. But what's different is it's
02:15:18 not blame -- it's not actual blame based on our breach of
02:15:23 the contract, it's we don't understand what our basic terms
02:15:27 are, and in the depositions and in the written discovery we
02:15:31 tried to flesh out from them what are the terms of the
02:15:33 agreement? What do you believe are the terms? You cannot
02:15:36 sustain a breach of contract action if you cannot articulate
02:15:42 definite terms. And when they can't in discovery articulate
02:15:46 definite terms and then say we don't even understand -- we
02:15:50 never -- again, the witness says at the deposition almost
02:15:53 verbatim, it was a misunderstanding. So at that point we
02:15:59 have actual evidence. At that point we have actual evidence
02:16:01 for a recision claim. I mean, that's our theory. If, in
02:16:07 fact, you're going to take a position that a contract wasn't
02:16:10 formed because you can't articulate definite terms, or that
02:16:13 you -- that there was no understanding between the parties
02:16:17 that there were definite terms that can be performed under
02:16:20 the agreement, then that goes to the world of recision. And
02:16:26 that is when we said okay, at this point if that's where
02:16:32 we're going, then we believe we have a claim.
02:16:35 Now, I think for a number of reasons we're
02:16:39 better off with a breach of contract claim because if we can

enforce our rights under the contract, we have other remedies. So this isn't the best claim that we have. But we don't think that we should have to defend their claim and not -- they're bound by their burden to prove a breach of contract in definite terms and if they're not going to do that in discovery, then they can't enforce a contractual claim against us.

If one of the remedies are for not articulating definite terms are claiming you misunderstand the essential definite terms of the contract including what obligates us to pay you, then you have the risk of recision and this court has the remedy of recision if necessary. So that's the point. It's not this is a brand-new claim, we can go figure something new out, this is alternative, new to the universe. We just want to be able to respond and have a right to respond with a legal remedy or equitable remedy.

THE COURT: Okay. Let's hear from the plaintiff.

MR. SIMON: Thank you, Your Honor.

MR. KITTILA: Your Honor, may it please the court, Ted Kittila on behalf of CIGNEX.

Your Honor, on July 23rd, 2018, Lam filed a motion to amend its counterclaim. This was done almost three months after the deadline to amend pleadings, which was April 25th, 2018. This was almost two months after the

deadline to complete the fact discovery, which was May 30th, 2018. This was only seven weeks before the summary judgment scheduled, as it was scheduled at that time which was set for September 11th with the date later being moved to December 4th.

Lam has completely ignored Rule 16. The schedule may be modified only for good cause and with the judge's consent. This is not a simple question of a Rule 15 amendment. This is a wholesale blowing of a deadline by several months.

THE COURT: Is it true that they asked you about amending the complaints on June 3rd and you didn't get back to them until July 16th?

MR. KITTILA: Your Honor, that would be my prior counsel. I do not know if that is exactly what the timing was. But even if it were June 3rd, that would have been at least a couple of months after when the time period to amend was. What happened with my prior counsel on the request to amend, I'm not certain.

THE COURT: Why don't you address the argument that they just found out some information after the deadline, and that's what -- essentially now you have changed your position. You're going to be arguing that there was no meeting of the minds here. Is that correct?

MR. KITTILA: I don't agree with that. We're in

the process of briefing our motion for summary -- our response to the motion for summary judgment, Your Honor, and I have been meeting with my colleague, Mr. McMillan quite a bit on this issue. And he said this is not the argument. It's not a question of whether or not there was a contract. There was a contract. It is a time and material contract, that is what it is. It is not a finished product contract, fixed price contract, if you will, Your Honor, where there is one product that is delivered at the end of this. When he talks about deliverables, when he talks about intent, this is a time and material contract.

I think the arguments and the discussion that came up during deposition came through when people were asking what was the scope of the work that was being performed at this point in time. One of the statements of work, one of the qualifications in there was that as far as it went, if there was going to be changes, material changes to the scope of the work that was being performed, this was going to add more time and costs with respect to the projects. And that's very much a part of the argument here.

We are not looking at this thing and saying that there wasn't an understanding on the contract. We knew what it was, it was time and material. If they wanted to keep changing the scope of the project, if they wanted to tell us that they wanted the MyLam portal to have more bells and

whistles or different bells and whistles, that was going to change the scope of the work that was involved and the cost as well. That is really the argument here.

I disagree with my friend's characterization of their being a misunderstanding and not knowing what was happening, and not understanding what they had to do under this thing. There may have been miscommunications from Lam to my client regarding what was happening. There may have been misunderstandings there, but everybody knew that this was a time and material contract.

Just like a law firm, if my client calls me up and ask me to go and prepare a will for them, and I prepare a trust instrument that they're not requesting, they're going to have a good complaint that something was going on.

That said, we are under the understanding that if you keep miscommunicating things to me it's going to add up and add to the project cost. That's what's happening here.

So, Your Honor, we continue to work -- Lam argued there must not be a meeting of the minds. You didn't understand the agreement. That is a new claim. That is not a new claim. Recision was something that they had in front of them from the very beginning. They could have brought this. They brought a kitchen sink of breach of contract claims. But in their own counterclaim, they said based on

02:22:30 defendant counterclaims, plaintiff's interaction with
02:22:33 plaintiff, it had become clear to the defendant/counterclaim
02:22:37 plaintiff, read it as Lam, that plaintiff was developing the
02:22:41 software without the full understanding of the requirement
02:22:45 of the project. That's in their counterclaim. They are
02:22:48 saying right there, you did not understand the project.
02:22:51 Now, according to my friend's new theory here is
02:22:55 that that would entitle them to recision. Well, they argued
02:23:00 that, or they put that in their pleadings. So from the very
02:23:04 beginning this could not be clearer that they were going to
02:23:07 be looking at this thing saying that our guys did not
02:23:10 understand the project.
02:23:11 Now, what's the harm? I have been thinking
02:23:15 about this quite a bit, Your Honor. There is a lot of harm
02:23:18 right now. Blowing a deadline like this is very important
02:23:22 because recision itself is a very complex claim. If you're
02:23:27 going to argue recision, I'm going to have to counter that
02:23:31 by arguing waiver. I'm going to have to argue estoppel.
02:23:35 I'm going to have to counter all these things with a number
02:23:38 of defenses which is going to require me to say if you
02:23:41 didn't think there was a meeting of the mind, Mr. Lam,
02:23:45 witness, then why are we at the point that this time that
02:23:50 you're not telling them to stop work on it and stop
02:23:54 charging? That's the problem that we have with this. This
02:23:57 is going to require additional discovery. Discovery that

was not focused on.

The reason why recision is at complicated as it is, is because you're looking at quasi equitable remedies at that point in time. One of the cases that we cited is the Thabbs case and I looked at that and traced that back in the Chancery courts and some of the issues that popped up in some in those cases were the waiver defenses, were the estoppel defenses.

We are so far beyond the close of discovery at this point in time, to sit down and reopen it right now when we're facing the barrel of a summary judgment motion to me is very hard for me to describe to my client why we are now back be into a discovery stage.

The other thing that's really important about this, is that if they had a recision claim, there is a possibility I would have moved for summary judgment. I didn't move for summary judgment because I have known for a long time in this court, the court does not like partial summary judgment motions. But there is enough issue there with a recision claim that that would have caused me to say we need to take care of this, otherwise this could end up in front of a jury. So it does cause a great deal of prejudice to me.

I can't set the clock on summary judgment now. We are now facing this. We are laying our cards on the

table for Your Honor. This thing is due on our part on Tuesday. So the reason I'm here by myself and I have my assistant with me is the fact that I have Mr. McMillan at the office working on responding to a summary judgment brief. Your Honor, deadlines have to mean something. This case has had a lot of slippage on deadlines. I understand everybody gets busy and everything along those lines, but you need to know whether or not you're going to be stating something as big as a recision claim when we're getting to the end of discovery, and discovery is closed.

THE COURT: Okay.

MR. KITTILA: Thank you, Your Honor.

THE COURT: Mr. Simon, do you want to add anything?

MR. SIMON: Thank you, Your Honor. I'll try to be brief.

First of all, just for the record, I think you asked Mr. Kittila why we wrote him or his counsel on June 3rd. I believe it was July 3rd. And they responded on July 16th.

THE COURT: Thank you for clarifying.

MR. SIMON: I do want to give them credit for that.

Second, something as big as a recision claim to use Mr. Kittila's words, then their theory that they didn't

know what was going on and there was no meeting of the minds should have been brought in the complaint. And what they're doing is essentially amending the complaint without an amendment.

THE COURT: What about Mr. Kittila's position that in the original counterclaim you said they didn't really understand what they were supposed to be doing under the contract? If he's saying look, we're just saying what you've already said, not that there is no meeting of the minds, but that we're saying look, apparently we didn't understand what you wanted, and you already said they didn't understand what they needed. What's new here?

MR. SIMON: Well, you can look at that two ways. One is they're on notice of that at the time we file the counterclaim.

THE COURT: And so you knew at the time you filed the counterclaim that you were saying they didn't know what they were doing. To the extent you're now saying they didn't know what they were doing, that means there is no meeting of the minds and we're not entitled to a recision. Why isn't that something you knew back then?

MR. SIMON: Well, two things. One is --

THE COURT: He's not saying as I understand it that they are going to be arguing we did not have a meeting of the minds such that we did not have a contract.

02:27:55 MR. SIMON: First of all, let's look at it in
02:27:57 the context of the pleadings. They allege that it was an
02:28:00 agreement. They alleged that they delivered everything per
02:28:03 the agreed to criteria. They allege we all have an
02:28:08 agreement and they knew exactly what we were doing. They
02:28:09 allege and we counterclaim that based on what the product
02:28:11 was that we got which was a disaster from our perspective,
02:28:17 they didn't know what they were doing. They denied that.
02:28:19 They expressly denied that and affirmatively stated in our
02:28:22 answer to our counterclaim that they did know what they were
02:28:25 doing.
02:28:27 So we're then back in the contract -- we're in
02:28:30 the contract realm where they've said now twice, no, we knew
02:28:35 exactly what we were doing. So we're off and running on a
02:28:38 contract. It's not until we get into discovery where -- I
02:28:41 mean, they didn't put blame on us at the mediation, you
02:28:45 know, they put blame on us for not potentially providing
02:28:52 them, I don't know, resources or what have you, I don't want
02:28:55 to get into the weeds on that.
02:28:56 But the point is that it's not clear in the
02:29:00 discovery where they say, and these quotes are in our reply,
02:29:05 they're saying we don't -- there is a misunderstanding, we
02:29:08 didn't know what we were supposed to do. It's not just
02:29:11 based on that, it's not just based on the fact that they
02:29:14 didn't know what they were doing, it's based on their

failure to articulate based on the terms of the contract. So if you don't have a contract affirmatively, you don't have a contract and you can't articulate a contract, let's say our counterclaim goes away, we don't have it, and they're asking for judgment from this Court on a breach of contract claim. And we said what are the elements of the contract and they can't identify or articulate the definite terms of the contract, you didn't meet your burden on the contract. If we have don't have a contract, then we don't have the parties. The parties go back to their status quo.

So, again, I hear this argument about we need all this discovery. All these facts are in the record. They asked our witnesses these very questions about what we provided, what we knew. These are their affirmative statements. If you look at the questions I asked, what do they intend to accomplish by the agreement? You can't get an answer. There is no answer to these basic questions. So there is nothing -- I don't think there is anything really complex in discovery. If there is an estoppel argument to make, those are going to be based on facts that already exist. They have got those facts. They have their witnesses that said certain things in deposition transcripts. They have taken the depositions of our witnesses.

But I don't think they can come to court on a

breach of contract claim and then amend their claim in discovery and not bear the consequences of that. I think that's fundamentally what they're looking at here. They're running away from the contract. They don't want a contract. And that is set forth in our motion for summary judgment, Your Honor, which is before the Court. If you look at the terms of the contract and what it says and their obligations to do are, they don't want anything to do with that.

There are allegations, for instance, they make the allegation we never objected to anything they did. I mean, look, we got a pretty thick appendix in front of the Court, hundreds, hundreds of tickets that we lodged about defective development.

THE COURT: I think we're getting into the substance of the matter here and not diligence and good cause.

MR. SIMON: That's fair, Your Honor. I guess the point of this is a lot of this has been fleshed out in the discovery already. I don't think there is a need to take further discovery.

And two, they have essentially tried to amend their theory of the case without any leave of the court and yet when we come in and say we think there ought to be a defense of that based on what you have done in discovery, they're saying no way. So, Your Honor, that's kind of the

crux of my argument.

Thank you, Your Honor.

THE COURT: Thank you. I think I understand these issues.

Let's move to the second question.

And Mr. Simon, you have submitted with your reply brief some documents and exhibits relating to references to problems with performance and legal process from the spring. What I'm trying to understand or what I would like you to focus on is why I should find that there was a reasonable or objective indication of litigation all the way back in August of 2015, which is I think the position that you're taking.

MR. SIMON: Okay. Your Honor, if you read the complaint, I mean that rhetorically, the complaint states that they were doing this project, they completed the project, and there is a couple of salient paragraphs where they say we delivered the work and there were no complaints and that we were doing this on a time and material basis, and you only raised complaints when you stopped paying our invoices as an excuse not to pay our invoices. That all occurred in August of 2015.

And those -- and that again, if this is their theory of their case, that we had liability to them as early of August of 2015, there is no protocol or protection of

documents that they now claim are relevant to their claims that we never objected to their work, that they performed the work without any errors or defects, and that we have no justification for not paying them in August of 2015.

So if you're going to bring a complaint on legal theories and your legal theories are based on facts that arise in 2015, then arguably in 2015 you got a dispute and you got a legal problem that you're going to foreseeably resolve in court if you can't resolve it consensually.

THE COURT: But are you saying that the basis for you to say that they should have reasonably foreseen litigation in August of 2015 is that you stopped paying them?

MR. SIMON: Yes, Your Honor. And they stopped -- and that's what they say in the complaint.

THE COURT: But they continued working and your client continued talking with them about issues that were ongoing with the work?

MR. SIMON: That's correct.

But I want the Court to understand this point is that I think as early as August 2015 based on the theories that they have chosen to pursue in this Court, they should have been on notice that they had a duty to preserve these documents. But that's not when the document destruction ended. The document destruction continued through August of

2016.

THE COURT: I understand.

MR. SIMON: So you have -- and not only do you have destruction in 2016, a year later, you have destruction intentionally, not in accordance with the policy. You have a destruction potentially after there have been legal threats back and forth. And the person whose documents you destroyed are the last remaining depository for every piece of correspondence between the project architects on this project and the project manager who is on site at our client.

So again, and I will take -- if I can digress a little bit. I'll be very candid, I'm not incandid in court. When I filed my motion for spoliation, I had the facts that I had, and I believe they destroyed evidence as late as March 2016 that was done pursuant to a policy that was wrong. And by the way, I was upset that they never disclosed it to us even though we repeatedly them for it including our initial document request. But if you look at the correspondence in the motion, you'll see initial disclosures were not even close to adequate. And we raised immediately issues of document production with them early in the case. And we didn't get a response at all substantively as to the location of these documents until the eve of depositions which is kind of the way things have gone in

this case.

And so I didn't learn of the actual facts, if they are the facts that we now know, until they filed their answering brief in response to my motion for spoliation, which I don't think is proper for a lot of reasons. And frankly, you know, that should temper some of the arguments I made in my opening brief. Had I had the accurate facts when I filed my opening brief, my motion would have read a little different. But I was floored when I got the answering brief and learned what happened. It was not a policy driven destruction of documents, but an intentional destruction of documents by the individual who took over the projects, not a programmer, who used the documents for his own benefit during the project because he didn't know what was going on, and then destroyed them after we had exchanged legal threats. There is a litany of actual hard threats from our client saying if you can't get your act together, we will sue you.

THE COURT: And the first recordation of those I think that's at least been submitted to me was the end of April 2016.

MR. SIMON: That's correct, Your Honor. That's correct. That's when the first document we have. There is a lot of internal documents and correspondence. If you look at the correspondence which documents complete

dissatisfaction, refusal to pay, those documents go back into 2015, in the fall of 2015, when we're saying we're not paying any of their invoices, you need to get your act together. We're lodging complaints. There is correspondence in 2015 on that point. And, you know, they should have foreseen, if their theory is we're entitled to be paid on net thirty terms when we issued an invoice for our work, and we're note paying them. If I'm their in-house counsel I'm telling them you need to make sure you maintain this.

What's striking is again this dovetails with the prior motion. I don't think they have to go the same way, but it's this emergence of facts as the case develops that we learn on the fly about what's going on and the positions in this case. And they are now trying to take the position that there was this grand misunderstanding about what the project was supposed to be and how it was supposed to be built and who was responsible for that. And yet all of the individuals who were responsible for that very, very important piece of the project, all of their records are gone. And it was never disclosed, which is --

THE COURT: Can you help me to understand the role of some of these people whose e-mails were destroyed. Let's start with Omprakash Misa. Do you know what Mr. or Ms. Misa's role was?

02:39:27 MR. SIMON: Misa, I believe, was a design,
02:39:33 coordinated design -- I'm trying to get the chart, Your
02:39:38 Honor.
02:39:38 THE COURT: If you have it someplace where I can
02:39:40 find it, rather than -- I have a chart with dates on it. I
02:39:46 just don't have it at the same place who people are.
02:39:52 MR. SIMON: Your Honor, if you could bear with
02:39:53 me. There is Exhibit E -- starting at exhibit D, I believe,
02:40:01 to our opening brief, we lay out the charts. And so what
02:40:07 you have are, if you look at the first chart on Exhibit E, I
02:40:12 don't know if you're there, but onshore, these are people
02:40:16 when they say onshore, these are individuals in the United
02:40:20 States who are working on the project.
02:40:23 And Omprakash I believe was more of a management
02:40:31 person involved in the coordination of -- he supervised
02:40:37 Mr. Pillai. Mr. Pillai is the center, he was in charge of
02:40:40 the project.
02:40:40 THE COURT: That's the person whose e-mails were
02:40:44 ordered not to be kept as of August 4th, 2016?
02:40:48 MR. SIMON: Yes. And to flesh out the factual
02:40:51 record, they told us -- he quit in February 2015. They told
02:40:56 us they deleted them as a matter of company policy in March.
02:40:59 That's contained in my opening brief.
02:41:04 THE COURT: I read that. That was wrong, he
02:41:07 actually did it in August because they wanted to keep his

e-mails around for Mr. --

MR. SIMON: It's Srinivas Tadeparti.

THE COURT: -- Tadeparti to get up to speed.

MR. SIMON: So Subbu as he's known, Subbu Pillai is the project manager. He is the quarterback. Offshore, you have -- what they do is they have somebody onshore dealing with the client and interacting with the client and a lot of development code is written in India.

Mr. Yadav, for instance, if you look at that top, he was a program manager, so he would be somebody who worked on design and kind of helping scope out the project.

And then the architects to the right, so LR Architect and Alfresco Architect, there are two components, there are software license, the portal, that person is tasked with designing how the website will work. And Alfresco is the database or the software that will manage the documents that LifeRay will portal into. So he's supposed to design that aspect of the project, how the documents go into Alfresco.

So if you look across, Nitin Yadav, he is the program manager. He kind of reports to management and coordinates with Subbu. Subbu is the project manager, Mr. Pillai. So he's responsible for the whole thing.

And then Nair and Joshi are the architects, the designers for lack of a better word of those two software

components.

And then below him, Jayaprakash and Sayeed, these are offshore. They would report back if we need code written. This is what we need.

THE COURT: Okay.

MR. SIMON: And that changes over time, but again, it's more startling for me because when we looked at documents -- first of all, we got it in an e-mail production. So we went back and we said this is crazy. We have a project that this long, it's 500 documents. I don't know the exact number, but it's low. And then we went back and we got more documents and we were getting ready for depositions and we're looking at these documents, they're all Bates labeled, they all have our Bates labels on them. All these e-mails from the project manager are from us.

So we go back to them and say why don't we have any documents from Mr. Pillai, you produced no e-mails from him. You don't see any from any of these folks. And they said from even May and back of 2018, we destroyed them according to a policy. And then as they set forth in their answering brief reply, that destruction was intentional. And the problem again is --

THE COURT: Even if it was done pursuant to policy, it was intentional; right?

MR. SIMON: I agree. First of all, we haven't

seen the policy.

THE COURT: So do you have any evidence that it was intentional meaning in bad faith related to this litigation?

MR. SIMON: I sure would like to take Mr. Tadepart's deposition again.

THE COURT: Did you ask for that?

MR. SIMON: I will, if Your Honor feels that's important. If this case goes to trial --

THE COURT: You're the one who has the burden on this motion; right?

MR. SIMON: I think there is -- I mean, there is a case law that says if they intentionally destroy evidence at the time that they knew or should have known about litigation, the burden shifts to them to explain why they did it and how and why. So I don't know that -- I don't have the case that says that, but I know that I have read that. It might be the Micron case that Judge Robinson decided. There is a Judge Sleet case that talks about willful destruction of evidence, and then where the burden goes.

But I would love to take his deposition. Again, I wish I had these facts when I drafted my brief because in some ways my opening brief was not totally accurate or persuasive enough. I do think this goes to the larger

problem in this case, which again, we have a theory of breach of contract. And we understand the contract. We performed all the terms of the contract pursuant -- we got the agreed criteria down and we delivered it to you. You never objected.

THE COURT: Yes, I get it. We're getting back to the substance.

MR. SIMON: Sorry.

THE COURT: Let's assume for a minute that I say okay, after there was a foreseeability of litigation, they got rid of documents that were important, or could have been important for this case, talk to me about what an appropriate remedy or sanction could be.

MR. SIMON: I'll start with this. You have destruction.

THE COURT: You're kind of asking that you win the case based on this. And I'm trying to understand what the basis for that is and whether you think there is any less drastic sanction that would be appropriate.

MR. SIMON: Well, first of all, we don't win the case because we still have the counterclaim, so we still have to come to court and affirmatively prove our case that they breached the agreement that we believe existed. And we would have -- they could have defenses to that without the defense of we didn't understand what was going on, but we

destroyed all the evidence that we understood what was going on. And I think we can handle that in the motion in limine, not to give you any ideas. But I don't think that we win the case, they just don't have a claim against us for breach of contract because they have taken away from us our right to challenge whether or not they performed under the contract and what they believed the contract was and what the terms of the contract were and actually whether they were able to perform the contract because of what they were talking about internal.

THE COURT: But don't they have to prove that? And if they don't have documents showing that they delivered what they said was going to be delivered and that you were okay with it, isn't that their problem, not yours?

MR. SIMON: First of all --

THE COURT: Presumably you have plenty of documents that show that your client wasn't just fine with what was happening, because slip in timeline and all kind of other things that don't suggest that your client was happy with what was going on.

MR. SIMON: I would like to believe that we would win, but this is a jury trial they have demanded, and they are going to be entitled to make arguments. And this is we have seen in the deposition, all the witnesses that we have been presented with, every single one of them had

nothing to do with the project of substance before February of 2016, and yet they're telling their story through these people that have no firsthand knowledge of the facts, denying us the chance to cross-examine these people based on what evidence they had and reviewed to get up to speed on the project and then destroyed.

THE COURT: Did you see discovery or any of the depositions from people who left prior to that time?

MR. SIMON: We tried. We were told that they were unlocatable. We did find one person, through, our own diligence who has refused to talk to us because they don't want to get into the middle of it. But we have asked for names.

Subbu, we would love to take his deposition. He was on site with our client. Our client had a good relationship with him. We think he would be extremely helpful to us.

Our theory of the case, I don't want to get into it today, but we have theories of the case and things that were said by him to us about what was happening elsewhere within CIGNEX that made this project a disaster, but we can't find him.

THE COURT: Okay.

MR. SIMON: And those questions were asked at deposition, as well.

02:48:59 THE COURT: Did you ask Mr. Tadeparti when he
02:49:04 was deposed -- I understand that at that time you thought
02:49:07 that documents had been destroyed in March 2016, but did you
02:49:11 ask him about it?
02:49:15 MR. SIMON: I don't want to misrepresent to the
02:49:17 Court, my recollection is I did ask him about the
02:49:19 destruction through to company policy that was represented
02:49:22 by counsel.
02:49:23 THE COURT: But probably more general?
02:49:24 MR. SIMON: Maybe this is the fault on my part.
02:49:27 The lawyer wrote me a letter and says here are the facts and
02:49:31 I have got limited time in the deposition. It was a two-day
02:49:35 deposition. I can't remember what I asked him on that
02:49:40 issue. If I did, we get the transcript, I'll look.
02:49:43 THE COURT: Okay.
02:49:45 MR. SIMON: Thank you, Your Honor.
02:49:46 THE COURT: Mr. Kittila, why is it that your
02:49:51 client wasn't on notice that litigation was reasonably
02:49:55 foreseeable at least as of the end of April when there were
02:49:58 comments made about the legal process and your client was
02:50:01 saying, no, no, no, that's not helpful, that they were not
02:50:05 fine?
02:50:05 MR. KITTILA: You know, Your Honor, I have
02:50:08 talked to my client about that, and said what is going on
02:50:11 with this? And honestly I think that that's probably some

cultural differences between a U.S. company versus an India company. They looked at the process, they didn't necessarily -- I think they saw there what was going on with respect to the threats. I think they saw that. And I don't think that they reacted the way a U.S. based company would probably react.

THE COURT: But the standard I'm supposed to apply is objective, not your subjective not familiar with U.S. law clients; right?

MR. KITTILA: That is correct. And I think that the Micron Technology case is very, very important, Your Honor. That's the case that I focused on with respect to this. Going back, you wish that somebody would receive an e-mail that says hey, we're going to get our lawyers involved in this and pick up the phone and call a guy like me, but that did not happen. It sounds to me like they were trying to self help their way through the process and figure this thing out. The problem that you have, though, is that you had a company policy which is that when you had employees departing from the company, you had them removing e-mail boxes off of the system. And without a recognition that that causes problems, especially when you have a potential for something to blow up.

I would like to go through a couple of things on Micron because I think it's going to be helpful for you on

your analysis, Judge.

THE COURT: Okay.

MR. KITTILA: So I talked to Mr. Tadeparti, and he's willing to be asked questions about these points. Because I wanted to make sure, too, if I'm standing in front of you, Mr. Tadeparti, did you throw out stuff that you knew was harmful to the company. And he said no. He said, I was up to speed.

THE COURT: But he got an e-mail from them and two days later, on August 2nd, I saw in their papers, he got an e-mail, or he was cc'd on an e-mail that says we're not talking to you anymore without a lawyer. And two days later, he said let's get rid of Mr. Pillai's e-mails. Doesn't that look bad?

MR. KITTILA: It does terrible. It looks terrible. I looked at that, too. It bothered me a great deal.

THE COURT: And Mr. Pillai was an important player in this case; right?

MR. KITTILA: He was the project manager on this. So Mr. Pillai's e-mail was important, but Mr. Tadeparti was taking over that role. And so that inbox he had I guess available to him I guess while he got up to speed. What happened was when Mr. Pillai left the company, he caused the inbox to be forwarded to him so that he could

begin to take a look at everything that was going in on that inbox, I guess so he could bring himself up to speed.

When I looked at this, I wondered why didn't you at that point in time, you know, immediately sit down and say let's hold on this, this is evidence. And he said, I have never been in a situation like this before.

And what this leads to, Your Honor, is I think that there is lots of people that probably do as employees of companies receive threats regarding e-mail, or threats of suit. I don't necessarily want employees, every employee of a company -- and this is over a thousand person company -- making a decision regarding whether or not a litigation hold should be put into place.

If you look, the next bit of correspondence that you see is August 4th in there. That's when in-house counsel, Divya Kumat, is brought up to speed. That's August 4th which was the day that this e-mail basically, the decision was made by Mr. Tadeparti to discard the e-mails.

THE COURT: Is it true thirty days after that decision was made, within thirty days they could have decided to try to keep those e-mails?

MR. KITTILA: No, that's actually a misunderstanding. The way AppRiver works, Judge, is that if I were to send an e-mail to Mr. Tadeparti, AppRiver will capture that e-mail for a period of thirty days. So in

other words, if something happens and they go into the laptop, you have a snapshot of that e-mail for thirty days.

Mr. Pillai had left the company so he wasn't really getting e-mails at that point in time other than the occasional spasm e-mail that was coming across his e-mail address, so there wasn't the thirty-day clawback. I went to investigate very closely with the company, and what happened was there was an e-mail that was sent out from the company and it looks like that there was about sixteen or so names on there of departed employees, and Mr. Pillai's e-mail was one of the persons on there.

Now, according to the company, what had happened was that somebody reached out to Tadeparti, and IT said we got approval from Tadeparti because we were just following up at that point in time, you know, this guy is a departed employee. Can we discard? And at that point, Tadeparti said yeah, I don't need it anymore.

I think if we're going go to be making judgment calls regarding Mr. Tadeparti, whether or not he actually did that, I think it would probably be good to have him sitting in the dock and asking him questions.

THE COURT: I set this hearing, and nobody asked me to have someone come here and testify.

MR. KITTILA: You know, Your Honor --

THE COURT: Nobody put in a declaration for

Mr. Tadeparti that I could look at and evaluate.

MR. KITTILA: Right. I get it, Your Honor. And we thought about having Mr. Tadeparti come in and sit for that, but it really is their burden to show that this was an intentional type of situation where he was discarding the e-mails.

THE COURT: You don't think by the dates and lining up the dates and the misinformation that they were given so they couldn't even ask Mr. Tadeparti about it originally is enough for them to say look, something smells bad here and we need to hear from them?

MR. KITTILA: Yes. I asked my client about why this date. Why did you report March and then report then August? Why did that happen? And that was unfortunately my prior counsel made an error on that. And I spoke with him yesterday. And he said, "Ted, I will tell you that I looked at it and I knew they were retaining e-mails for about thirty days. I didn't realize that they kept Subbu's e-mail longer than that period of time. And as far as it went, suddenly I realized that Tadeparti had asked to keep it open so he could have a transition period on there."

THE COURT: Was the first time that they found out about that mistake was when they got that answering brief or were they told before then?

MR. KITTILA: From what I could tell the first

time that we discovered that internally, that the prior counsel discovered that internally was September right when they were briefing this.

THE COURT: But they didn't say hey, we got this wrong, do you want to amend your brief, they just answered it?

MR. KITTILA: They just answered it, yes, Your Honor.

THE COURT: And he was stuck with a reply.

MR. KITTILA: He was stuck with a reply. And, Your Honor --

THE COURT: Is the policy that CIGNEX says it was following that is outlined in the declaration that was submitted, was that written down?

MR. KITTILA: Your Honor, I have seen a written policy. I don't know if that is a policy that has been written recently because of what has happened in this case. So I'm not exactly certain and I'm not prepared to say whether or not there is a written policy as of that point in time. And so that's the important thing.

THE COURT: Were there privilege logs that were exchanged in this case?

MR. SIMON: Your Honor, they have never given us a privilege log.

THE COURT: I was going to ask if there was a

time when they started asserting more product, but I guess --

MR. SIMON: We had been told that they were going to give us one. We did not produce, we were not asked to produce a privilege log. That's not the word I was looking for. We asked them for a privilege log and it was never provided.

THE COURT: Okay.

MR. KITTILA: Your Honor, if I could go through the Micron factors for you, I think it would be helpful.

Your Honor, Micron is the case that I know Your Honor is familiar with. The standard in the case is when litigation is reasonably foreseeable, that's a flexible standard. That gives you a great deal of discretion in looking at this.

THE COURT: Let's say I can't believe that it wouldn't have been reasonably foreseeable after, or at least as of April of 2016 when they started making clearly referring to the legal process.

MR. KITTILA: The problem I think, Your Honor, with doing something like that is that Micron knows that litigation is an ever present possibility in American life.

THE COURT: But when it's actually threatened, it's very different than saying it's possible. I mean, look, they want me to go back to August of 2015 when they

stopped paying, and I say look, I get it, sometimes people don't pay their bills and you don't go sue them because that's not a productive way to go. I understand that. But by the time we get to April of 2016, they were pretty annoyed and they were threatening legal process and your folks knew it. And your folks spent some time working on an e-mail response to them including about the legal process.

MR. KITTILA: Correct. Correct. And I have seen that in there. What we're talking about really is Subbu's e-mail at that point in time, because Subbu's e-mail is the one that is carrying over beyond that date. I mean, there were some other e-mails in --

THE COURT: There is some other people.

MR. KITTILA: There is some others, I agree with that.

THE COURT: Ashish Jain and Joshi's e-mail was lost after that time.

MR. KITTILA: I think that the important point with respect to that is that I think you're going to always see people putting in to various things. This is a case where when we started out, they did not identify that April e-mail on their initial motion, that April presentation as the litigation threat. You can kind of see how this has gone where suddenly now unfortunately counsel fed up to them a new date which was the date that Subbu's e-mail was then

suddenly -- you know, there was an order to get rid of the e-mail as of August 4th.

THE COURT: You guys included in your papers an answering brief, an e-mail from May, May 3rd of 2016, that talked about the response to the legal process, so it's not just that Mr. Simon put stuff in late, that was in your document.

MR. KITTILA: No doubt. No doubt, Your Honor. I think if we had our rathers to rebrief things along those lines, this is the sort of thing that happens when you have transition of counsel.

Your Honor, I think the problem that you have, too, is take a look at Micron very closely. In Micron you had a date by which there was a document destruction that had taken place, and then there was a second date by which document destruction was taking place.

And the court looked at it and said, well, that really, there was a reasonableness at a certain point in time. And what they used was the analogy of a gun being loaded versus being cocked. That's the point in time when litigation was reasonably foreseeable. So unlike in Micron, you don't have a litigation policy which is the document retention policy becoming the litigation retention policy.

Fourth, unlike in Micron, whether litigation was reasonably foreseeable was largely dependent on whether Lam

chose to litigate. Lam didn't litigate initially. It was us that brought this. So ultimately Lam did not choose to litigation. And nineteen months later after the Subbu e-mail was gone, CIGNEX brought suit to pursue its invoices. I would also note, Your Honor, that fifth and finally in Micron --

THE COURT: Wait. I want to make sure I'm not misunderstanding. So because they didn't sue you, but you destroyed the e-mails and you sued them, that's supposed to work in your favor?

MR. KITTILA: That's a reasonable foreseeability, Your Honor. So in other words, let's take company X. They're sitting there working with everything, and you're saying that a litigation hold needs to be put in place the moment that somebody threatens a lawsuit. At that point in time, is it reasonably foreseeable that we were going to sue? Mr. Tadeparti has no idea whether or not the company is going to sue or not.

THE COURT: What is it that you think? They told you in that presentation, and you guys certainly appreciated it because it was specifically responded to, that they were thinking of legal proceedings, that legal proceedings might be necessary. So what more do you think would be needed to make it reasonable foreseeability?

MR. KITTILA: I think at that point in time,

Your Honor, I think what you have to have is you need to have somebody at the company raising it to the level where they're actually going and reaching up to --

THE COURT: That's a subjective standard for this particular company. This is an objective standard I'm supposed to be following. Right? And I have a company who says things are not going well. Everybody knew that things weren't going perfectly. Your client wasn't getting paid. There were still plenty of outstanding things, whether it was their fault, or your fault, I don't know, but nobody thought this project was going swimmingly. And then they brought up legal standards. So objectively, what more do you think should have -- what more would you say needs to be done to meet a standard of reasonable foreseeability, objectively?

MR. KITTILA: Objectively at that point in time, Your Honor, I think that people need to be having discussions actually with in-house counsel on whether or not a litigation hold needs to be put in place. At that point in time, Your Honor, then I can look at that and say that is when the lawyer is involved, is sitting there, is saying, you know, it's not just somebody sitting on a telephone call with Verizon saying I'm going to sue you guys in small claims court. It's somebody actually sitting there and saying we received a threat, let's take this and analyze it.

The problem that you have with this thing is this thing gets escalated to Ms. Kumat. Ms. Kumat is looking at this thing. She needs to go out there and vet what the law is. She has absolutely no time to vet what the law is under the standard that they set up. What they said is that the moment that somebody says litigation, suddenly that triggers right there.

That's not what Micron said. Micron walked through and, in fact, they said in general when parties have a business relationship that is mutually beneficial and that ultimately turns sour sparking litigation, the litigation will generally be less foreseeable than with litigation resulting from a relationship that is not new mutually beneficial or is naturally adversarial.

THE COURT: That is not a situation where someone is threatening to sue them beforehand. They're saying suddenly if we have a good relationship and you all of a sudden are like, you know what, you think everything is going okay, that you're still talking, all of a sudden they same forget it, I'm done, and they sue you the next day. Here there were actually threats. What do you think a reasonable employee -- don't you think getting that presentation and putting together a response that a reasonable employee should have raised that with someone in legal?

03:07:02 MR. KITTILA: I think that if you look at the
03:07:03 litigation threats that are happening in April, and I don't
03:07:08 even characterize them as litigation threats, I characterize
03:07:12 them as we are going to have involvement of counsel.
03:07:17 THE COURT: Legal proceedings; right?
03:07:19 MR. KITTILA: Legal proceedings, whatever that
03:07:20 may be. But at that point in time, Your Honor --
03:07:24 THE COURT: You don't think a scientist or a
03:07:28 computer engineering would say legal proceedings, gosh,
03:07:31 that's above my pay grade?
03:07:33 MR. KITTILA: I think if you have somebody
03:07:35 sitting there and saying hey, litigation, if somebody is
03:07:38 sitting there and says I'm going to sue you, at that point
03:07:43 in time I would agree with you. If I say litigation
03:07:46 proceedings, and they say I wonder what, I can look at that
03:07:50 sort of thing and say okay, maybe we should probably have
03:07:54 somebody involved.
03:07:55 But I think even if in-house counsel is involved
03:07:57 at that point in time, Judge, that's when it needs to attach
03:08:01 is when the in-house counsel is involved and is able to vet
03:08:06 things and is able to set the policy for bringing in a
03:08:12 litigation hold.
03:08:12 If I'm running a 10,000 employee company and I'm
03:08:15 the general counsel, I do not want employee X making a
03:08:19 determination on whether or not a litigation hold is going

to be put in place.

THE COURT: That's your problem for not instructed employees that when someone talks about legal proceedings or legal issues that they should bring in a lawyer. It's not like your company didn't have in-house counsel to talk to. And so you can't hide behind the fact that your employees didn't go to them, you can't tag us with anything until the counsel was involved. What if Mr. Tadeparti on his own said, oh, that sounds bad, I better get ready. I'm not saying he did, but if he did, he said that sounds bad, I better get rid of some of this bad documentation so I don't look bad, you can't tell me that that wouldn't sanctionable even if --

MR. KITTILA: I agree.

THE COURT: -- even if he hadn't gone to in-house litigation counsel and said oh, now we have to set up litigation.

MR. KITTILA: There is no doubt about it, Your Honor. And you have got to have the ability as the judge sitting here to be able to say if somebody because God forbid, I'm usually on the plaintiff's side, if somebody is throwing out -- this happened to me a very large bank where my client sent in the litigation threat and they went and shredded the documents. I looked at that and I said okay, come on, now, I need to be able to get that.

But I think the problem is, is that if we're going to get to this point, I learned a lesson from then Chancellor Strine, he said if you make statements in pleadings and in court and you say a person intentionally spoliated evidence, that is a serious allegation. That right there is a sanctionable type of situation where a person could lose their job over this thing. This happened in the TR Investors case versus Genger, working with Bill Lafferty on this case, it had that somebody made some allegations regarding somebody, an IT professional doing that.

I think that Mr. Tadeparti should have the opportunity to sit there and say I didn't do it. I didn't know. I had no knowledge that this was happening.

The problem is that we've lost e-mails that would have been helpful for us. You're right, we would be able to show all the work that Subbu had done, all the work that was being performed by Subbu. I think there was probably helpful stuff in there. I think there was probably harmful stuff in there. But we lost that. But the problem now is we have an allegation now painted about Mr. Tadeparti of having gone in and put on a black hat and decided to throw things out.

THE COURT: When you say he should have an opportunity, he could have put in a declaration, but he

didn't.

MR. KITTILA: He did not put in a declaration, Your Honor.

THE COURT: And tell me about what you think if I were to find spoliation occurred, what is an appropriate sanction?

MR. KITTILA: Your Honor, one thing that is perfectly clear from Micron is that dismissal is not the appropriate sanction. In fact, they referred to that as a harsh sanction only to be imposed in particularly aggrieved situations where a party is engaged in deliberately and deceptive practices that undermined the integrity of the judicial proceedings. I think if anything we have a situation where somebody probably made a mistake. And if that is the case, Your Honor, my predecessor counsel argued that only an adverse inference be made. I don't know if I necessarily would have argued that an adverse inference, because I don't know what that necessarily means, what you're going to tell the jury. Perhaps it means that I'm not allowed to sit there and refer to Subbu Pillai during the trial to try to make my case. I think that's a fair result on this thing.

If you're going to throw stuff out, guess what, Subbu's work, you can't really point to that. I think that's probably correct. But I'm stuck with the pleadings

that were put in before I came on to this case and it's an adverse inference is what my prior counsel argued for. It's definitely not that they win in the case. For somebody that's trying to sit there and trying to do the right thing, is doing something that puts -- that suddenly you can find that got you mechanism like this, it just doesn't -- the court has never been like that. This is an equitable court as well as a law court. And this court has never reached down and said got you, you had a policy in place.

I mean, what that does is that just says really you should have no document discarding policy, you have to save everything. And I have been at companies where you had to save absolutely every single solitary thing.

Your Honor, I would say they probably could get the e-mails probably as late the third week of August they would have probably been able to claw those e-mails back. If you want to take an adverse inference from that that did not happen at that point in time, I think that would probably be as far as I think that would be allowed under what Micron says, Your Honor.

THE COURT: Okay. Thanks.

Mr. Simon, what do we do with the -- if I'm looking for bad faith, something more than I didn't put two and two together and this was just the policy and I didn't think about it. I haven't been involved in litigation.

What is the impact on that on my decision here as to whether there was spoliation.

MR. SIMON: Let me make sure I understand the question.

THE COURT: Let's say I'm looking for something a little bit more than the documents are gone, because everybody acknowledges that, and that they were destroyed after I think there should have been reasonable foreseeability of litigation, at least from an objective standard. But let's say that I'm sympathetic to Mr. Kittila saying, but look, this guy didn't know any better. And I realize you want to take his deposition, but this guy didn't know any better, and so there really should be some aspect of bad faith. If you look at the Gold case, for example, in the Third Circuit when they say bad faith. How am I supposed to find something about bad faith here?

MR. SIMON: Let me help you with that. Mr. Tadeparti is a high level executive at CIGNEX. And when this project fell apart at the end of 2015, he and Mr. Ramachandran who is the CEO of this company were on an e-mail dated August 2nd, 2016. This is in my reply brief.

THE COURT: This is the one where they're said we're not meeting again without legal representation.

MR. SIMON: That's right. Everybody knew this project was a disaster. In fact, Mr. Tadeparti wrote, "It's

a mess." He's not a programmer, he came in to save the job. He's very sophisticated. He's an interesting guy to depose, because he's pretty sophisticated, but when you ask him basic questions, he's all over the place, and I don't know what's going on there. They all knew this was a mess. The highest levels of this company were involved in this project at this point. Our legal department was involved.

This is bigger than just the deletion of e-mails, Your Honor. Mr. Kittila is my neighbor and friend. After this reply was filed, counsel resigned or left the case. And I had a good personal relationship with that firm. But I would say this case happened like this motion, from the beginning. They gave us initial disclosures. There was nobody on there. We knew that half the people -- I wrote a letter saying this is not acceptable. There is more people that have knowledge. They supplement --

THE COURT: More than zero?

MR. SIMON: I'm sorry?

THE COURT: More than zero?

MR. SIMON: Maybe two. They supplemented their initial disclosures. I can't remember the last time I saw supplemented initial disclosures. We got an anemic document production. Nobody says a word. We issued document requests. We asked them to identify lost and destroyed documents.

Your Honor, this isn't Micron and Apple, this is not a big case. I'm representing my client, this is a big case, but this isn't the kind of case that you have teams of attorneys working on. I'm working on this case myself with other cases. You start to get these documents and realize stuff is missing. And nobody says a word to you at all about what's going on.

And then you get false -- what's called fake news. You go into a deposition for this fake news and you accept their word for this news as gospel. If we didn't file this spoliation motion we would have never known when they destroyed the documents and why, ever.

I'm embarrassed to admit this. I have been doing this for twenty years. Every time I get an answering brief for something I write, I'm always nervous to read it. What did I mess up? What did I step in? There are a lot of smart lawyers in Delaware, they got me. This sat on my desk for two days before I had a chance to get to it. And then I read it. And I couldn't believe what I was reading. And nobody said a word to me. They could have picked up the phone or wrote me a letter and said look, we're wrong. They argue in their motion that they didn't do anything wrong. How would they know August 4th when they intentionally destroyed the documents, a high level employee came in to work with the CEO, how would they know that there was a

03:18:41 legal issue? They knew.

03:18:42 And they used the word in early September,
03:18:45 they're writing about recovery action. I don't know if they
03:18:48 withheld documents on privilege. I have asked Mr. Beehler
03:18:51 for privilege logs for months. I never got a privilege log,
03:18:55 ever.

03:18:56 So I don't know if there is other privilege
03:18:59 documents. But they did produce documents with their
03:19:04 counsel where they're talking about recovery action, they're
03:19:06 going to sue us.

03:19:09 THE COURT: What was the date of those
03:19:11 documents?

03:19:11 MR. SIMON: I'm sorry?

03:19:11 THE COURT: What is the date of those, after the
03:19:14 stop work order in August?

03:19:16 MR. SIMON: Yes, September 9th, where the CEO
03:19:19 writes about a recovery action.

03:19:20 Now, these are CIGNEX Datamatics, this is a big
03:19:29 company. They're part of another big company. This is an
03:19:32 IT company. They know how to get e-mails. They know how to
03:19:36 get documents. Mr. Pillai's e-mail account isn't just
03:19:40 Mr. Pillai's e-mail account, it's the repository for
03:19:43 everybody else's e-mails. Everybody else that was involved
03:19:46 in the building and design of this project. Everybody they
03:19:49 produced for the deposition had nothing to do with the

project until late. They told us it was a mess. The depositions are replete with I don't know. I wasn't there. I couldn't tell you. I don't know. I wasn't involved. I have no idea. So we lost the opportunity to investigate the internal discussions of this company's work on this project. And then they sued us. They chose to sue us. We didn't sue them. And they can't say, you know, we ---look, we didn't realize we were going to get sued, we made a mistake. They sued us, exactly when they contemplated doing in September of 2016, for $500,000. They wanted their money. So they're not a victim here. They're not unsophisticated. They acted intentionally, and they lied about it, not Mr. Kittila, but they lied about it until they filed their answering brief and they didn't disclose it.

I mean, it doesn't get any more willful than that. If it's not spoliation in the sense of spoliation in the sense of Micron or whatever case you want to pick from the Third Circuit, it's inequitable, bad faith litigation misconduct, this Court can order any remedies that it deems fit.

And striking their claim doesn't get rid of the case. We're at zero. We paid them almost $700,000. We have attorney fees on top of it. We still have to come to the court and they still have their defenses. We can get an adversary inference on their conduct. If the court is going

03:21:28 to let me, I would cross-examine their witnesses at trial of
03:21:32 what they did and why because I want the jury to hear.
03:21:35 I want to be perfectly clear, I put none of this
03:21:38 on Mr. Kittila, none of, whatsoever. He's been a gentleman.
03:21:42 I like him. He's a friend of mine. I think it's telling
03:21:45 that the counsel who handled this case up to the reply is
03:21:49 not here to answer for it. It's telling that Mr. Tadeparti
03:21:53 is not here. There is not a privilege log. There is
03:21:57 evidence of bad faith. They should have kept e-mails from
03:22:01 this project. If their theory of the complaint, tie back to
03:22:04 the complaint, if their theory of the complaint is we're
03:22:07 supposed to be paid net 30 on time and terms, in 2015 they
03:22:12 had a problem. If we sued them, I can see maybe
03:22:16 justification. But they sued us for the very theory that
03:22:20 they -- that existed, the factual basis for that claim exist
03:22:24 in 2015. They're suing to recover payment on invoices that
03:22:29 date from 2015.
03:22:33 So I'm troubled by -- I'm troubled that there is
03:22:39 any sort of -- I would be troubled if there wasn't some --
03:22:44 there is not enough evidence for wilful conduct. This isn't
03:22:48 here. And this isn't a motion that I write every day. I
03:22:51 don't take these things lightly, especially dealing with
03:22:54 counsel. But this relationship was sour, to use
03:22:59 Mr. Kittila's description of the Micron case. It was sour
03:23:02 in 2015. And it was definitely legal in 2016.

THE COURT: Okay.

MR. SIMON: Thank you, Your Honor.

THE COURT: Do you want to add anything?

MR. KITTILA: Your Honor, just to make things clear, though, Morris, James was involved in this case, and this wasn't a Morris, James issue. I think it's important to know that. This wasn't a Delaware counsel issue. The mistaken things in the letter that went over to Mr. Simon went through out-of-state counsel, over their letterhead.

The issue here is that it may be a big company. And it may be employees that are sophisticated. And Mr. Tadeparti would come across as a sophisticated man. But in discussing this with him, he's very, very concerned. This goes to his credibility. It goes to him being a fall guy for somebody. That's what this motion is about, you know, that somebody would go through and actually throw away things that could have a company sanctioned. That is so severe. And the idea there -- I mean, he was legitimately scared. And the idea that somehow, Your Honor, that they were going to throw out -- I mean, if they were going to be intentional about it, they would have thrown out a lot of things. There was enough things there to throw out, you would have been a lot more tactical than this.

And Micron shows that. In Micron they would go through the e-mails and find the stuff that's good, hold on

to that. There was a lot of good stuff that Subbu was doing because there were reports that were coming back from Mr. Brad Estes that says I'm plenty surprised by what is going on. They were turning things around. Mr. Subbu, unfortunately Mr. Pillai, whose nickname is Subbu, Mr. Pillai got sick and he left because of health reasons. There wasn't some sort of let's bury this and run. The idea here was that Pillai's e-mails were necessary and they shouldn't have even been in -- been saved as long as they were. They shouldn't have been, but they were saved because of the fact that Mr. Tadeparti thought he needed them to get up to seed. He was up to speed.

The idea that somehow these guys didn't know what they were doing at that point in time, Tadeparti knew where he was going with the project, even after the stop work order on August 5th, they were working together. The stop work order, this was a big misnomer throughout this whole thing, it was like suddenly everybody, pens down. It wasn't pens down. It was stop work on the project. Let's fix these things and let's try to figure it out.

THE COURT: I think there are some disputes about that and I don't think we need to get into that.

MR. KITTILA: So, Your Honor, I do want to say -- and by the way, I echo Mr. Simon's good gestures of friendship and good will. There is nothing here -- I

03:26:35 understand why he brought this, and I understand the
03:26:40 concerns that it probably does raise. I think if Tadeparti
03:26:45 were to come in -- we realize this was an argument to be
03:26:49 done on the law and that sort of thing. If he were, I think
03:26:52 he could defend himself and say I didn't know. I didn't
03:26:55 think about it. I made a mistake. There but by the grace
03:27:00 of God go I. That sort of type of thing. And I think you
03:27:04 need to have that opportunity before a finding of bad faith
03:27:10 is made.
03:27:13 The Bull case I think is important.
03:27:15 Thank you, Your Honor.
03:27:18 THE COURT: It's your motion so I'll give you
03:27:20 the last word if you need it.
03:27:22 MR. SIMON: I apologize, Your Honor. On that
03:27:24 point, it's an objective standard. Second, I forgot
03:27:28 something. We did raise in our motion, we believed and we
03:27:32 stated that there were recordings of meetings we had with
03:27:35 CIGNEX and they were never produced.
03:27:38 THE COURT: I actually wanted to ask about that.
03:27:40 MR. SIMON: And the answering brief didn't
03:27:43 address it. I don't know, under some case law I would argue
03:27:47 that's waiver, but we have never received any -- we are just
03:27:51 told they don't exist. That's what we're told.
03:27:54 THE COURT: That did catch my attention in the
03:27:56 papers because that's not e-mail, that was something --

MR. KITTILA: That's right.

THE COURT: -- nobody disputed existed, but doesn't seem to have been produced.

MR. KITTILA: I would have to check with prior counsel on that, Your Honor. I saw that mentioned in the brief. And I looked and of course when the briefing was all done, I saw they hadn't addressed that. I was more focused on getting down to the bottom of what happened to the e-mail and reaching out to Mr. Tadeparti and everything. I'm happy to look further into that, Your Honor, if you wish. I know that we're sort of -- we're getting to the edge of trying to get everything done so this case stays on schedule for trial.

THE COURT: Okay. So this is what we're going to do. We're going to take about a five-minute break while I think about a couple of things and then we'll come back.

(A brief recess was taken.)

THE COURT: Please be seated.

So I have the two motions in front of me. With respect to the motion to amend counterclaims, I'm prepared to rule. And I will do that now. With respect to the motion for spoliation, I'm going to reserve on that, but I do have some thoughts about some additional work that should be done on that which I'll tell you in a minute.

First with respect to the counterclaims.

Defendant seeks to amend its counterclaims to add certain factual allegations and accounts seeking revision of the contract at issue. The motion was filed on July 23rd, 2018. The scheduling order in the case as amended and agreed upon by the parties set April 25th, 2018 as the deadline for amendment of the pleadings. As defendants sought leave to amend well after that date, they must satisfy the criteria of Rule 16(b)(4) of the Federal Rules of Civil Procedure which provides that a schedule may be modified only for good cause and with the judge's consent.

The primary measure of good cause is the movant's diligence in attempting to meet the scheduling orders requirement. And that one I'll cite, the Harris v. FedEx National case, 760 F3d 780, the Eighth Circuit 2014.

Consistent with that this Court has found that good cause is present when schedules cannot be met despite the moving party's diligence.

Here, defendant argues that good cause exist because in its estimation plaintiff changed the positions in depositions that occurred after the April 25th date and point specifically to testimony of CIGNEX's designee pursuant to Rule 30(b)(6), Mr. Tadeparti, who was deposed on June 6th, 2016.

Plaintiff argues that defendant was not diligent because there was no change in position. The dispute was

evident from the original complaint and plaintiff points out in its papers that defendant relied in its brief on statements from the mediation in February of 2018 in asserting that claimant changed its positions and that mediation was well before the amendment date.

The Court agrees with plaintiff that there was not appropriate diligence here and good cause has not been shown.

First, I have read the cited excerpts of the deposition and I'm not convinced that there has been a change in position such as the one that the defendant asserts occurred. Moreover, the defendant knew of the deadline for amendment, it knew the depositions would occur after that deadline, but it did not ask to have that date changed.

Finally, once the deposition occurred in June where the purported change in position occurred, defendant did not move for leave to amend for almost seven weeks.

Finally, while prejudice is not the standard under Rule 16, even if the Court were to look at this under Rule 15, it would deny the amendment. There is a dispute as to whether additional discovery would be needed and to whether additional defenses or responses to the counterclaim would need to be pleaded. The Court agrees with plaintiff that it is likely that at least some discovery would be

03:49:21 needed and at this stage in the case that would require
03:49:24 wholesale changes to the schedule and prejudice the
03:49:27 plaintiffs, thus defendant's motion for leave to defend its
03:49:30 counterclaim is denied.
03:49:30 With respect to the motion for spoliation, I
03:49:33 think that the papers that were submitted as well as the
03:49:36 arguments we've heard here today indicate that there are
03:49:40 serious questions about what happened. But I will take into
03:49:46 account plaintiff's request that before I rule, I should
03:49:51 give Mr. Tadeparti an opportunity to be heard. So what I
03:49:56 will do is I will order that Mr. Tadeparti be made available
03:50:01 for deposition. That deposition I'm not going to limit the
03:50:05 time other than the seven-hour deadline in the rules. But
03:50:10 it should be limited to issues relating to the sanctions and
03:50:15 the spoliation motion.
03:50:20 And then I would ask that by January 19th, each
03:50:26 party -- I'll ask defendant to submit the entire transcript
03:50:30 of that entire deposition to me and each party may have two
03:50:34 pages in which they can spell out for me what they think the
03:50:37 import of that deposition was with respect to the pending
03:50:42 motion.
03:50:42 Are there any questions?
03:50:45 MR. KITTILA: No, Your Honor.
03:50:46 MR. SIMON: None from defendant, Your Honor.
03:50:48 THE COURT: Okay. Then we will be in recess.

03:50:50 Thank you.

(Court adjourned at 3:50 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Dale C. Hawkins
Official Court Reporter
U.S. District Court

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEBORAH S. SKEANS, Executrix of the ESTATE OF FRANK E. PAVLIS, *Plaintiff*, v. KEY COMMERCIAL FINANCE, LLC, KEY COMMERCIAL FINANCE PROPERTIES, LLC, EQUITY PROS, LLC, and MOBILE AGENCY, LLC, *Defendants*. *Third-Party Defendants*.	)	C.A. No. 1:18-cv-01516-CFC

PLAINTIFF'S RESPONSES AND OBJECTIONS TO DEFENDANTS' FIRST REQUESTS FOR ADMISSION

Plaintiff, Deborah S. Skeans, Executrix of the Estate of Frank E. Pavlis ("Plaintiff"), objects and responds to Defendants' First Requests for Admission as follows:

GENERAL OBJECTIONS

A. Plaintiff objects to each request for admission that seeks materials or information protected by the attorney-client privilege, work product doctrine, or any such or similar applicable privilege, protection or immunity.

B. Plaintiff objects to each request for admission that seeks materials or information already in the requesting party's possession or equally available to the requesting party.

C. Plaintiff objects to all instructions and definitions as imposing obligations or conditions inconsistent with, or more stringent than, those imposed by the Federal Rules of Civil Procedure. Plaintiff will respond in accordance with the Rules and consistent with the plain meaning of the words used in each request for admission.

D. These responses are based upon information presently known by Plaintiff. It is anticipated that further discovery, investigation, legal research and analysis will supply additional factual conclusions and legal contentions. Plaintiff reserves the right to rely on such additional discovery, investigation, legal research and analysis, and to make such additions, changes, and variations to these responses as warranted.

RESPONSES TO REQUESTS FOR ADMISSION

1. Admit that the Estate of Frank E. Pavlis is no longer the holder of the Key Commercial Finance, LLC Convertible Promissory Note dated September 1, 2014, in the amount of $3 million (attached as Ex. 1 hereto).

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around September 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff admits as follows: On or about September 19, 2017, Mr. Pavlis signed an "Assignment of Note," the terms of which purported to transfer Mr. Pavlis' interests in the referenced note to "Frank E. Pavlis TOD Watchtower Bible and Tract Society of New York, Inc."

2. Admit that the Key Commercial Finance, LLC Convertible Promissory Note dated September 1, 2014, in the amount of $3 million (attached as Ex. 1 hereto) was transferred on the date of Frank E. Pavlis' death to the Watchtower Bible and Tract Society of New York, Inc., c/o Charitable Planning Office, 100 Watchtower Drive, Patterson, NY 12563-9204.

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around September 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff admits as follows: On or about September 19, 2017, Mr. Pavlis signed an "Assignment of Note," the terms of which purported to transfer Mr. Pavlis' interests in the referenced note to "Frank E. Pavlis TOD

Watchtower Bible and Tract Society of New York, Inc."

3. Admit that Frank E. Pavlis assigned the Key Commercial Finance, LLC Convertible Promissory Note dated September 1, 2014, in the amount of $3 million on September 19, 2017, the date of the "Assignment of Note" (attached as Ex. 2 hereto).

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around September 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff admits as follows: On or about September 19, 2017, Mr. Pavlis signed an "Assignment of Note," the terms of which purported to transfer Mr. Pavlis' interests in the referenced note to "Frank E. Pavlis TOD Watchtower Bible and Tract Society of New York, Inc."

4. Admit that Frank E. Pavlis had capacity to assign the Key Commercial Finance, LLC Convertible Promissory Note dated September 1, 2014, in the amount of $3 million on September 19, 2017, the date of the "Assignment of Note" (attached as Ex. 2 hereto).

Response: Plaintiff objects to this request on the grounds the phrase "had capacity" is vague and ambiguous. To the extent the request is referring to Mr. Pavlis' legal and/or mental capacity, Plaintiff objects on the grounds that it calls for a legal conclusion and/or a medical opinion, neither of which Plaintiff is obligated or able to provide. Plaintiff further objects to this request on the grounds that it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around September 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff admits as follows: Plaintiff admits that, in her lay opinion, Mr. Pavlis had capacity to sign the "Assignment of Note." Plaintiff is without knowledge or information as to whether Mr. Pavlis understood the contents or import of the "Assignment of Note," other than her belief that Mr. Pavlis signed the "Assignment of Note" on the recommendation and advice of his estate planning counsel.

5. Admit that Frank E. Pavlis was never deemed to be incompetent or to otherwise lack capacity.

Response: Plaintiff objects to this request on the grounds the phrase "was never deemed to be incompetent or otherwise lack capacity" is vague and ambiguous. To the extent the request is referring to Mr. Pavlis' legal and/or mental capacity, Plaintiff objects on the grounds that it calls for a legal conclusion and/or a medical opinion, neither of which Plaintiff is obligated or able to provide. Subject to and without waiving these objections, Plaintiff admits as follows: Plaintiff admits that, to her knowledge, Mr. Pavlis had never been found to have been legally or mentally incompetent by any medical professional or as a result of any legal proceeding.

6. Admit that Deborah Skeans was aware of the "Assignment of Note" (attached as Ex. 2 hereto) at the time that it was signed by Frank E. Pavlis.

Response: Admitted.

7. Admit that Deborah Skeans was aware of the existence of both (a) the Key Commercial Finance, LLC Convertible Promissory Note dated September 1, 2014, in the amount of $3 million (attached as Ex. 1 hereto), and (b) the Key Commercial Finance, LLC Convertible Promissory Note dated November 1, 2014, in the amount of $4 million (attached as Ex. 3 hereto) before the date of Frank E. Pavlis' death.

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Notes were valid legal instruments and/or were actually issued to Mr. Pavlis, in or around September 1, 2014 or November 1, 2014, respectively, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff admits as follows: Plaintiff admits that she was aware of the existence of copies of documents purporting to be the referenced Promissory Notes prior to the date of Mr. Pavlis' death.

8. Admit that the Key Commercial Finance, LLC Convertible Promissory Note dated November 1, 2014, in the amount of $4 million (attached as Ex. 3 hereto) was bequeathed to the Watchtower Bible and Tract Society of New York, Inc. as part of Mr. Pavlis' estate.

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around November 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Plaintiff further objects to this request on the grounds that the phrase "was bequeathed to the Watchtower Bible and Tract Society of New York, Inc. as part of Mr. Pavlis' estate" is vague and ambiguous and calls for a legal conclusion. Subject to and without waiving these objections, Plaintiff responds as follows: Denied.

9. Admit that the Estate of Frank E. Pavlis is no longer the holder of the Key Commercial Finance, LLC Convertible Promissory Note dated November 1, 2014, in the amount of $4 million (attached as Ex. 3 hereto).

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the referenced Promissory Note is a valid legal instrument and/or was actually issued to Mr. Pavlis, in or around November 1, 2014, or at any other time. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such notes or related instruments as it did not legally exist or operate prior to December 2014. Absent legal capacity, the notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff responds as follows: Denied.

10. Admit that Frank E. Pavlis did not disclaim his signature on either of the Note Purchase Agreements attached as Exhibit 4 or Exhibit 5.

Response: Plaintiff objects to this request on the grounds it calls for a legal conclusion and assumes that the documents attached as Exhibits 4 and 5 were actually issued to and/or signed by Mr. Pavlis. Plaintiff further objects to this request on the grounds that Key Commercial Finance, LLC lacked the legal standing or capacity to issue any such documents as it did not legally exist or operate prior to December 2014. Absent legal capacity, the note purchase agreements and related notes purportedly issued by Key Commercial Finance, LLC to Mr. Pavlis are *void ab initio*. Subject to and without waiving these objections, Plaintiff responds as follows: Plaintiff lacks knowledge or information sufficient to admit or deny whether Mr. Pavlis signed either of the documents attached as Exhibits 4 and 5, and if Mr. Pavlis did sign these documents, lacks knowledge or information sufficient to admit or deny whether he ever disclaimed his signature on those documents.

11. Admit that Frank E. Pavlis made an investment in or a loan to a charter school known as Circle of Seasons in 2014 in excess of $390,000.

Response: Plaintiff objects to this request on the grounds it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence, as the issues in this case relate to the fraudulent misappropriation of funds Mr. Pavlis invested, and does not relate to any loans Mr. Pavlis made to entities not named in, or otherwise involved with, this lawsuit. Subject to and without waiving this objection, Plaintiff admits as follows: Mr. Pavlis made a loan to Circle of Seasons in the approximate amount of $415,000.00 in 2014.

12. Admit that Deborah Skeans assisted with the making of the loan referenced in Request No. 11.

Response: Plaintiff objects to this request on the grounds it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence, as the issues in this case relate to the fraudulent misappropriation of funds Mr. Pavlis invested, and does not relate to any loans Mr. Pavlis made to entities not named in, or otherwise involved with, this lawsuit. Plaintiff objects to this request on the grounds that phrase "assisted with the making of the loan referenced in Request No. 11" is vague and ambiguous. Subject to this objection, Plaintiff admits as follows: Plaintiff admits that she requested that Justin Billinglsey ask Mr. Pavlis to make a loan to Circle of Seasons.

13. Admit that Frank E. Pavlis' net worth at the date of his death exceeded $70 million.

Response: Plaintiff objects to this request on the grounds it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence, as the issues in this case relate to the fraudulent misappropriation of funds Mr. Pavlis invested, and does not relate to Mr. Pavlis' net worth at the date of his death. Subject to this objection, Plaintiff responds as follows: Denied.

14. Admit that Deborah Skeans spoke directly with Craig Harris, a reporter from the Arizona Republic, relating to Mr. Justin Billingsley and Frank E. Pavlis.

Response: Admitted.

15. Admit that Darbin Skeans spoke directly with Craig Harris, a reporter from the Arizona Republic, relating to Mr. Justin Billingsley and Frank E. Pavlis.

Response: Admitted.

STRADLEY RONON
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Attorneys for Plaintiff, Deborah Skeans, Executrix of the Estate of Frank E. Pavlis

Dated: April 27, 2020

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

- - -

DEBORAH S. SKEANS, Executrix of the ESTATE OF FRANK E. PAVLIS, Plaintiff,	:	CIVIL ACTION NUMBER 1:18-cv-01516-CFC
v.	:	
KEY COMMERCIAL FINANCE, LLC, KEY COMMERCIAL FINANCE PROPERTIES, LLC, EQUITY PROS, LLC, and MOBILE AGENCY, LLC, Defendants.	:	

- - -

Wednesday, April 29, 2020

- - -

Oral deposition of DEBORAH S. SKEANS, taken remotely via Zoom, at 222 North 28th Street, Allentown, Pennsylvania 18104, beginning at 9:32 a.m., reported stenographically by Cheryl L. Goldfarb, a Registered Professional Reporter, Notary Public, and an approved reporter of the United States District Court.

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going to stop sharing this a second and then come back.

BY MR. GREEN:

Q. Now, you had mentioned before, in listing the assets of the estate, you mentioned a $1 million Allwest note and a $4 million Key Commercial Finance note.

Because it's part of the litigation, you're also aware that there is a $3 million Key Commercial Finance note, yes?

A. Yes.

MR. MAHONEY: I'll object to the extent that it calls for a legal conclusion as to whether that note truly exists or was valid.

I don't want to keep interrupting you, Bill, on this.

MR. GREEN: Sure.

MR. MAHONEY: With that standing objection whenever you or Ms. Skeans refers to that note, I'm happy to let you ask questions about it.

MR. GREEN: Gotcha.

BY MR. GREEN: